Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services	)	CC Docket No. 95-20
1998 Biennial Regulatory Review -- Review of *Computer III* and ONA Safeguards and Requirements	)	CC Docket No. 98-10

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: January 29, 1998 **Released: January 30, 1998**

Comment Date: March 27, 1998
Reply Date: April 23, 1998

By the Commission: Commissioner Furchtgott-Roth issuing a separate statement.

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I. INTRODUCTION

1. In the Commission's *Computer III*[1] and *Open Network Architecture* (ONA)[2] proceedings, the Commission sought to establish appropriate safeguards for the provision by the Bell Operating Companies (BOCs) of "enhanced" services.[3] Examples of enhanced services include, among other things, voice mail, electronic mail, electronic store-and-forward, fax store-and-forward, data processing, and gateways to online databases. Underlying this effort, as well as our reexamination of the *Computer III* and ONA rules in this Further Notice of Proposed Rulemaking (Further Notice), are three complementary goals. First, we seek to enable consumers and communities across the country to take advantage of innovative "enhanced" or "information" services[4] offered by both the BOCs and other information service providers (ISPs). Second, we seek to ensure the continued competitiveness of the already robust information services market. Finally, we seek to establish safeguards for BOC

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[1] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer III*), Report and Order, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon.*), *Phase I Order and Phase I Recon. Order, vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*), *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *recon. dismissed in part*, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 115 S.Ct. 1427 (1995) (referred to collectively as the *Computer III* proceeding).

[2] *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1 (1988) (*BOC ONA Order*), *recon.*, 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order*); 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order*), *erratum*, 5 FCC Rcd 4045 (1990), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), *recon.*, 8 FCC Rcd 97 (1993) (*BOC ONA Amendment Reconsideration Order*); 6 FCC Rcd 7646 (1991) (*BOC ONA Further Amendment Order*); 8 FCC Rcd 2606 (1993) (*BOC ONA Second Further Amendment Order*), *pet. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993).

[3] Basic services, such as "plain old telephone service" (POTS), are regulated as tariffed services under Title II of the Communications Act. Enhanced services use the existing telephone network to deliver services that provide more than a basic transmission offering. *Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, Memorandum Opinion & Order, 10 FCC Rcd 1724 n.3 (1995) (*Interim Waiver Order*); 47 C.F.R. § 64.702(a). The terms "enhanced service" and "basic service" are defined and discussed more fully *infra* at ¶ 38.

[4] The terms "enhanced services" and "information services" are used interchangeably in this Further Notice. *See infra* note 17.

provision of enhanced or information services that make common sense in light of current technological, market, and legal conditions.

2. Under *Computer III* and ONA, the BOCs are permitted to provide enhanced services on an "integrated" basis (*i.e.*, through the regulated telephone company), subject to certain "nonstructural safeguards," as described more fully below.[5] These rules replaced those previously established in *Computer II*, which required AT&T (and subsequently the BOCs) to offer enhanced services through structurally separate subsidiaries.[6] On February 21, 1995, the Commission released a Notice of Proposed Rulemaking (*Computer III Further Remand Notice*)[7] following a remand from the United States Court of Appeals for the Ninth Circuit (*California III*).[8] The *Computer III Further Remand Notice* sought comment on both the remand issue in *California III* relating to the replacement of structural separation requirements

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[5] *See infra* Part II.A. The Commission initially applied the *Computer III* and ONA rules to both AT&T and the BOCs. *Computer III Phase I Order*, 104 FCC 2d 958 (1986). In subsequent orders, the Commission first modified, and then relieved, AT&T of most *Computer III* and ONA requirements. *See, e.g., Computer III Phase I Reconsideration Order*, 2 FCC 3035 (1987); *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880 (1991); *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562 (1995). AT&T was never subject to the annual and biannual ONA reporting requirements the Commission imposed on the BOCs in the *BOC ONA Further Amendment Order*, 6 FCC Rcd 7646 (1991). AT&T remains subject, however, to a modified ONA plan that the Commission approved in 1988 and for which AT&T must submit an annual affidavit. *AT&T ONA Order*, 4 FCC Rcd 2449 (1988); *see* discussion *infra* at ¶ 116. AT&T also is subject to the Commission's customer proprietary network information (CPNI) and network information disclosure rules. *See discussion infra* ¶¶ 117-126. In 1994, the Commission extended to GTE the Commission's requirements regarding ONA unbundling, ONA reporting, CPNI, and network information disclosure, among other things. *Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation*, CC Docket No. 92-256, 9 FCC Rcd 4922 (1994) (*GTE ONA Order*). The Commission has not applied the *Computer III/ONA* requirements to any other local exchange carriers (LECs). Our discussion of the *Computer III* and ONA requirements in this Further Notice are intended to cover their application with respect to AT&T and GTE to the extent applicable.

[6] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer II*), 77 FCC 2d 384 (1980) (*Final Decision*), *recon.*, 84 FCC 2d 50 (1980) (*Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[7] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*).

[8] *California v. FCC*, 39 F. 3d 919 (9th Cir. 1994) (*California III*).

for BOC provision of enhanced services with nonstructural safeguards,[9] as well as the effectiveness of the Commission's *Computer III* and ONA nonstructural rules in general.[10]

3. Since the adoption of the *Computer III Further Remand Notice*, significant changes have occurred in the telecommunications industry that affect our analysis of the issues raised in this proceeding. Most importantly, on February 8, 1996, Congress passed the Telecommunications Act of 1996 (1996 Act)[11] to establish "a pro-competitive, de-regulatory national policy framework" in order to make available to all Americans "advanced telecommunications and information technologies and services by opening all telecommunications markets to competition."[12] As the Supreme Court recently noted, the 1996 Act "was an unusually important legislative enactment" that changed the landscape of telecommunications regulation.[13]

4. The 1996 Act significantly alters the legal and regulatory framework governing the local exchange marketplace. Among other things, the 1996 Act opens local exchange markets to competition by imposing new interconnection, unbundling, and resale obligations on all incumbent local exchange carriers (LECs), including the BOCs.[14] In addition, the 1996 Act allows the BOCs, under certain conditions,[15] to enter markets from which they previously

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[9] *See infra* Part III.A.

[10] *Computer III Further Remand Notice*, 10 FCC Rcd at 8362, ¶ 2.

[11] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as the "Communications Act" or the "Act."

[12] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).

[13] *Reno v. ACLU*, 117 S.Ct. 2329 (1997).

[14] *See* 47 U.S.C. § 251; *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15808, ¶ 611 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997); *vacated in part on reh'g, Iowa Utilities Bd. v. FCC*, 120 F.3d 753, *further vacated in part sub nom. California Public Utilities Comm'n v. FCC*, 124 F.3d 934, *writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998), *petition for cert. granted*, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively, *Iowa Utils. Bd.*), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *further recons. pending.*

[15] *See* 47 U.S.C. §§ 271, 272.

were restricted,[16] including the interLATA telecommunications and interLATA information services markets.[17] In some cases, the 1996 Act requires a BOC to offer services in these markets through a separate affiliate.[18] In addition, the 1996 Act incorporates new terminology and definitions that differ from those the Commission had been using.[19]

5. In light of the 1996 Act and ensuing changes in telecommunications technologies and markets, we believe it is necessary not only to respond to the issues remanded by the Ninth Circuit, but also to reexamine the Commission's nonstructural safeguards regime governing the provision of information services by the BOCs. Congress recognized, in passing the 1996 Act, that competition will not immediately supplant monopolies and therefore imposed a series of safeguards to prevent the BOCs from using their existing market power to engage in improper cost allocation and discrimination in their

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[16] Prior to the 1996 Act, the BOCs and their affiliates effectively were precluded under the Modification of Final Judgment (MFJ) from providing information services across local access and transport area (LATA) boundaries, as those terms were defined in the MFJ. *See United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982) (subsequent history omitted). While the MFJ, as originally entered, prohibited the BOCs from providing information services, that restriction was subsequently narrowed, and then eliminated entirely in 1991. *United States v. Western Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988); *United States v. Western Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991) (subsequent history omitted). The MFJ still prohibited the BOCs from providing services across LATA boundaries; thus the BOCs could provide information services only between points located in the same LATA. Pursuant to section 601 of the 1996 Act, *see* 47 U.S.C. § 152 nt, the Act supplants the restrictions and obligations imposed by the MFJ.

[17] The terms "local access and transport area" or "LATA," "information service," and "telecommunications service" are defined in the Act. *See* 47 U.S.C. §§ 153(25), (20), (46). In the *Non-Accounting Safeguards Order*, we concluded that all the services the Commission has previously considered to be "enhanced services" are "information services" as defined in the Act. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955, ¶ 102 (1996) (*Non-Accounting Safeguards Order*) (subsequent citations omitted). We seek comment in this proceeding on whether those services previously considered to be "basic services" fall within the definition of "telecommunications services" as defined in the Act. *See infra* ¶ 41. We also seek comment on whether the Commission should conform its terminology to that used in the Act. *See infra* ¶ 42. Thus, all providers that previously were considered to be enhanced service providers (ESPs) would now be deemed information service providers (ISPs). For historical consistency, however, we use the terms "enhanced service" and "basic service" in this Further Notice as necessary when discussing certain notices, orders, and decisions that used those terms prior to the 1996 Act.

[18] *See infra* ¶¶ 20-23. We note that on December 31, 1997, the United States District Court for the Northern District of Texas held that sections 271-275 of the Act are a bill of attainder and thus are unconstitutional as to SBC Corporation and U S WEST. *SBC Communications, Inc. v. Federal Communications Comm'n*, No. 7:97-CV-163-X, 1997 WL 800662 (N.D. Tex. Dec. 31, 1997) (*SBC v. FCC*) (ruling subsequently extended to Bell Atlantic), *request for stay pending*. In general, the analysis in this Further Notice assumes the continued applicability of these provisions to the Bell companies. At appropriate places in this Further Notice, however, we ask commenters to assess the impact of *SBC v. FCC* on our analysis.

[19] *See* discussion of "telecommunications service" and "information service" *infra* at Part IV.A.

provision of interLATA information services, among other things. These statutory safeguards seek to address many of the same anticompetitive concerns as, but do not explicitly displace, the safeguards established by the Commission in the *Computer II*, *Computer III*, and ONA proceedings. We therefore issue this Further Notice to address issues raised by the interplay between the safeguards and terminology established in the 1996 Act and the *Computer III* regime. These 1996 Act-related issues were not raised in the *Computer III Further Remand Notice*. We therefore ask interested parties to respond to the issues raised in this Further Notice and, to the extent that parties want any arguments made in response to the *Computer III Further Remand Notice* to be made a part of the record for this Further Notice, we ask them to restate those arguments in their comments.

6. We note, in addition, that Congress required the Commission to conduct a biennial review of regulations that apply to operations or activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be "no longer necessary in the public interest."[20] Accordingly, the Commission has begun a comprehensive 1998 biennial review of telecommunications and other regulations to promote "meaningful deregulation and streamlining where competition or other considerations warrant such action."[21] In this Further Notice, therefore, we seek comment on whether certain of the Commission's current *Computer III* and ONA rules are "no longer necessary in the public interest." To the extent parties identify additional *Computer III* and ONA rules they believe warrant review under the Act, we invite those comments as well.

7. Consistent with the 1996 Act, in this Further Notice we seek to strike a reasonable balance between our goal of reducing and eliminating regulatory requirements when appropriate as competition supplants the need for such requirements to protect consumers and competition, and our recognition that, until full competition is realized, certain safeguards may still be necessary. We want to encourage the BOCs to provide new technologies and innovative information services that will benefit the public, as well as ensure that the BOCs will make their networks available for the use of competitive providers of such services. We therefore seek comment in this Further Notice on, among other things, the following tentative conclusions:

-- notwithstanding the 1996 Act's adoption of separate affiliate requirements for BOC provision of certain information services (most notably, interLATA information services), the Act's overall pro-competitive, de-regulatory framework, as well as our public interest analysis, support the continued application of the Commission's nonstructural safeguards regime to BOC provision of intraLATA information services [¶¶ 43-59];

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[20] 47 U.S.C. § 161(a)(2).

[21] *See 1998 Biennial Review of FCC Regulations Begun Early*, FCC News Release (rel. Nov. 18, 1997).

-- given the protections established by the 1996 Act and our ONA rules, we should eliminate the requirement that BOCs file Comparably Efficient Interconnection (CEI) plans and obtain Common Carrier Bureau (Bureau) approval for those plans prior to providing new intraLATA information services [¶¶ 60-65];

-- at a minimum, we should eliminate the CEI-plan requirement for BOC intraLATA information services provided through an Act-mandated affiliate under section 272 or 274 [¶¶ 66-72]; and

-- the Commission's network information disclosure rules established pursuant to section 251(c)(5) should supersede certain, but not all, of the Commission's previous network information disclosure rules established in *Computer II* and *Computer III* [¶ 122].

We also generally seek comment on, among other things, the following issues:

-- whether enactment and implementation of the 1996 Act, as well as other developments, should alleviate the Ninth Circuit's concern about the level of unbundling mandated by ONA [¶¶ 29-36];

-- whether the Commission's definition of the term "basic service" and the 1996 Act's definition of "telecommunications service" should be interpreted to extend to the same functions [¶¶ 38-42];

-- whether the Commission's current ONA requirements have been effective in providing ISPs with access to the basic services that ISPs need to provide their own information service offerings [¶¶ 85-90];

-- whether the Commission, under its general rulemaking authority, should extend to ISPs some or all section 251-type unbundling rights, which the Commission previously concluded was not required by section 251 of the Act [¶¶ 94-96]; and

-- how the Commission's current ONA reporting requirements should be streamlined and modified [¶¶ 99-116].

8. As set forth in the 1998 appropriations legislation for the Departments of Commerce, Justice, and State, the Commission is required to undertake a review of its implementation of the provisions of the 1996 Act relating to universal service, and to submit

its review to Congress no later than April 10, 1998.[22] The Commission must review, among other things, the Commission's interpretations of the definitions of "information service" and "telecommunications service" in the 1996 Act, and the impact of those interpretations on the current and future provision of universal service to consumers, including consumers in high cost and rural areas.[23] We recognize that there is a some overlap between the inquiry in this Further Notice about the relationship between the Commission's definition of the term "basic service" and the 1996 Act's definition of "telecommunications service," and the issues to be addressed in the Commission's report to Congress. Furthermore, we recognize that other aspects of this Further Notice also may be affected by the analysis in the Universal Service Report. We note that the inquiry in this Further Notice is primarily focused on the rules and terminology the Commission should be using in the context of its *Computer II* and *Computer III* requirements. We also note that the order in this proceeding will be issued after the Universal Service Report is submitted to Congress, and will thus take into account any conclusions made in that report.

II. BACKGROUND

A. Overview of *Computer III*/ONA and Related Court Decisions

9. We discussed in detail the factual history of *Computer III*/ONA in the *Computer III Further Remand Notice*.[24] One of the Commission's main objectives in the *Computer III* and ONA proceedings has been to permit the BOCs to compete in unregulated enhanced services markets while preventing the BOCs from using their local exchange market power to engage in improper cost allocation and unlawful discrimination against ESPs. The concern has been that BOCs may have an incentive to use their existing market power in local exchange services to obtain an anticompetitive advantage in these other markets by improperly allocating to their regulated core businesses costs that would be properly attributable to their competitive ventures, and by discriminating against rival, unaffiliated ESPs in the provision of basic network services in favor of their own enhanced services operations. In *Computer II*, the Commission addressed these concerns by requiring the then-integrated Bell System to establish fully structurally separate affiliates in order to provide enhanced services.[25]

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[22] *See* Pub. L. 105-119, § 623, 111 Stat. 2440 (1997) (Universal Service Report); *see also Common Carrier Bureau Seeks Comment for Report to Congress on Universal Service Under the Telecommunications Act of 1996*, Public Notice, CC Docket No. 96-45 (Report to Congress), DA 98-2 (rel. Jan. 5, 1998).

[23] *Id.*

[24] *Computer III Further Remand Notice*, 10 FCC Rcd at 8362-8369, ¶¶ 3-10.

[25] *Computer II Final Decision*, 77 FCC 2d 384, 475-486, ¶¶ 233-60.

Following the divestiture of AT&T in 1984,[26] the Commission extended the structural separation requirements of *Computer II* to the BOCs.[27]

10. In *Computer III*, after reexamining the telecommunications marketplace and the effects of structural separation during the six years since *Computer II*, the Commission determined that the benefits of structural separation were outweighed by the costs, and that nonstructural safeguards could protect competing ESPs from improper cost allocation and discrimination by the BOCs while avoiding the inefficiencies associated with structural separation.[28] The Commission concluded that the advent of more flexible, competition-oriented regulation would permit the BOCs to provide enhanced services integrated with their basic network facilities.[29] Towards this end, the Commission adopted a two-phase system of nonstructural safeguards that permitted the BOCs to provide enhanced services on an integrated basis. The first phase required the BOCs to obtain Commission approval of a service-specific CEI plan in order to offer a new enhanced service.[30] In these plans, the BOCs were required to explain how they would offer to ESPs all the underlying basic services the BOCs used to provide their own enhanced service offerings, subject to a series of "equal access" parameters.[31] Thus, the CEI phase of nonstructural safeguards imposed obligations on the BOCs only to the extent they offered specific enhanced services. The Commission indicated that such a CEI requirement could promote the efficiencies of

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[26] *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *affirmed sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[27] *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies*, CC Docket No 83-115, Report and Order, 95 FCC 2d 1117, 1120, ¶ 3 (1984) (*BOC Separation Order*), *affirmed sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), *affirmed on recon.*, FCC 84-252, 49 Fed. Reg. 26056 (1984) (*BOC Separation Reconsideration Order*), *affirmed sub nom. North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985). *See infra* note 136 for a discussion of the *Computer II* structural separation requirements.

[28] *Computer III Phase I Order*, 104 FCC 2d at 964-965, ¶¶ 3-6.

[29] *Computer III Phase I Order*, 104 FCC 2d at 963.

[30] The Commission initially imposed these CEI requirements on AT&T as well. In subsequent orders, the Commission first modified, and then relieved, AT&T of these requirements. The Commission has never imposed CEI requirements on GTE or any other independent LEC. *See supra* note 5.

[31] *See Computer III Phase I Order*, 104 FCC 2d at 1035-1042, ¶¶ 147-166. As described in note 169 *infra*, the nine CEI parameters are: 1) interface functionality; 2) unbundling of basic services; 3) resale; 4) technical characteristics; 5) installation, maintenance, and repair; 6) end user access; 7) CEI availability as of the date the BOC offers its own enhanced service to the public; 8) minimization of transport costs; and 9) availability to all interested ISPs.

competition in enhanced services markets by permitting the BOCs to participate in such markets provided they open their networks to competitors.[32]

11. During the second phase of implementing *Computer III*, the Commission required the BOCs to develop and implement ONA plans. The ONA phase was intended to broaden a BOC's unbundling obligations beyond those required in the first phase. ONA plans explain how a BOC will unbundle and make available to unaffiliated ESPs network services in addition to those the BOC uses to provide its own enhanced services offerings.[33] These ONA plans were required to comply with a defined set of criteria in order for the BOC to obtain structural relief on a going-forward basis.[34] This means that a BOC would not need to obtain approval of CEI plans prior to offering specific enhanced services on an integrated basis. The Commission also required the BOCs to comply with various other nonstructural safeguards in the form of rules related to network disclosure, customer proprietary network information (CPNI), and quality, installation, and maintenance reporting.[35] All of these nonstructural safeguards were designed to promote the efficiency of the telecommunications network, in part by permitting the technical integration of basic and enhanced services and in part by preserving competition in the enhanced services market through the control of potential anticompetitive behavior by the BOCs.[36]

12. In 1990, the Court of Appeals for the Ninth Circuit vacated three orders in the *Computer III* proceeding, finding that the Commission had not adequately justified the decision to rely on (nonstructural) cost accounting safeguards as protection against cross-subsidization of enhanced services by the BOCs.[37] In response to this remand, the

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[32] *Computer III Phase I Order*, 104 FCC 2d at 963, ¶ 2.

[33] *Computer III Phase I Order*, 104 FCC 2d at 1063-1068, ¶¶ 210-225.

[34] *Computer III Phase I Order*, 104 FCC 2d at 1064, 1067-68, ¶¶ 213, 220-21. The unbundling standard for the BOCs required that: (1) the BOCs' enhanced services operation obtain unbundled network services pursuant to tariffed terms, conditions, and rates available to all ESPs; (2) BOCs provide an initial set of basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible; (3) ESPs participate in developing the initial set of network services; (4) BOCs select the set of network services based on the expected market demand for such services, their utility as perceived by enhanced service competitors, and the technical and costing feasibility of such unbundling; and (5) BOCs comply with CEI requirements in providing basic network services to affiliated and unaffiliated ESPs. *Id.*, 104 FCC 2d at 1064-66, ¶¶ 214-218.

[35] *Computer III Phase I Order*, 104 FCC 2d at 1080-1086, 1089-1091, ¶¶ 246-255, 260-265; *Computer III Phase II Order*, 2 FCC Rcd at 3084-3086, ¶¶ 88-98.

[36] *Computer III Phase I Order*, 104 FCC 2d at 1063, ¶ 210.

[37] *California I*, 905 F.2d at 1232-1239 (*vacating* the *Computer III Phase I Order*, *Phase I Recon. Order*, and *Phase II Order*).

Commission adopted the *BOC Safeguards Order*, which strengthened the cost accounting safeguards, and reaffirmed the Commission's conclusion that nonstructural safeguards should govern BOC participation in the enhanced services industry, rather than structural separation requirements.[38]

13. During the period from 1988 to 1992, the Commission approved the BOCs' ONA plans, which described the basic services that the BOCs would provide to unaffiliated and affiliated ESPs and the terms on which these services would be provided.[39] During the two-year period from 1992 to 1993, the Bureau approved the lifting of structural separation for individual BOCs upon their showing that their initial ONA plans complied with the requirements of the *BOC Safeguards Order*,[40] and these decisions were later affirmed by the Commission.[41]

14. After *California I* and the Commission's response in the *BOC Safeguards Order*, the Ninth Circuit in *California II* upheld the Commission's orders approving BOC ONA plans.[42] In *California II*, the court concluded that the Commission had scaled back its vision of ONA since *Computer III* by approving BOC ONA plans before "fundamental unbundling" had been achieved.[43] The court also concluded that the issue of whether implementation of ONA plans justified the lifting of structural separation, as the Commission had determined, was not properly before it.[44]

15. In *California III*, the Court of Appeals for the Ninth Circuit partially vacated the Commission's *BOC Safeguards Order*.[45] The *California III* court found that, in granting full structural relief based on the BOC ONA plans, the Commission had not adequately

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[38] *See BOC Safeguards Order*, 6 FCC Rcd at 7578-7588, 7617-25, ¶¶ 14-41, 98-109.

[39] *See supra* note 2 for a full citation of the ONA proceedings.

[40] *See Computer III Further Remand Notice*, 10 FCC Rcd at 8366 n.22, for a string citation of the referenced orders.

[41] *Petition for Removal of the Structural Separation Requirements and Waiver of Certain State Tariffing Requirements*, 9 FCC Rcd 3053 (1994) (*Structural Relief Order*), *joint motion for remand granted in light of California I, MCI v. FCC*, No. 94-1597 (D.C. Cir. May 10, 1995).

[42] *California v. FCC*, 4 F.3d 1505.

[43] *Id.* at 1511-13.

[44] The Court pointed out that the petition for review before it covered four Commission ONA orders, but not the specific Commission order lifting structural separation. *Id.* at 1513.

[45] *California III*, 39 F.3d at 930.

explained its apparent "retreat" from requiring "fundamental unbundling" of BOC networks as a component of ONA and a condition for lifting structural separation.[46] The court was therefore concerned that ONA unbundling, as implemented, failed to prevent the BOCs from engaging in discrimination against competing ESPs in providing access to basic services.[47] The court did find, however, that the Commission had adequately responded to its concerns regarding cost-misallocation by strengthening its cost accounting rules and introducing a system of "price cap" regulation;[48] the court indicated its belief that these strengthened safeguards would significantly reduce the BOCs' incentive and ability to misallocate costs.[49] The court also upheld the scope of federal preemption adopted in the *BOC Safeguards Order*.[50]

16. In response to *California III*, the Bureau issued the *Interim Waiver Order*, which reinstated the requirement that BOCs must file CEI plans, and obtain Commission approval of those plans, to continue to provide specific enhanced services on an integrated basis.[51] Also in response, the Commission issued the *Computer III Further Remand Notice*, which sought comment on the *California III* court's remand question regarding the sufficiency of ONA unbundling as a condition of lifting structural separation, and on the general issue of whether relying on nonstructural safeguards serves the public interest.[52]

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[46] *Id.* at 929-930.

[47] *Id.*

[48] Price cap regulation focuses primarily on the prices that an incumbent LEC may charge and the revenues it may generate from interstate access services. Price cap regulation encourages incumbent LECs to improve their efficiency by harnessing profit-making incentives to reduce costs, invest efficiently in new plant and facilities, and develop and deploy innovative service offerings, while setting price ceilings at reasonable levels. Thus, price caps act as a transitional regulatory scheme until the advent of actual competition makes price cap regulation unnecessary. *Access Charge Reform*, CC Docket No. 96-262, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, *Transport Rate Structure and Pricing*, CC Docket No. 91-213, *End User Common Line Charges*, CC Docket No. 95-72, First Report and Order, 12 FCC Rcd 15982, 15993-94, ¶ 26 (1997) (*Access Reform Report and Order*).

[49] *California III*, 39 F.3d at 926.

[50] *California III*, 39 F.3d at 931-933. *See infra* ¶ 131 for a discussion of the scope of federal preemption adopted in the *BOC Safeguards Order*.

[51] *Interim Waiver Order*, 10 FCC Rcd 1724. *See infra* ¶ 60 for a more complete discussion of the *Interim Waiver Order*.

[52] *Computer III Further Remand Notice*, 10 FCC Rcd at 8362, ¶ 2.

B. Overview of the 1996 Act

17. Since the *California III* remand and the Commission's release of the *Computer III Further Remand Notice*, the 1996 Act became law and the Commission has conducted a number of proceedings to implement its provisions. These developments give us a fresh perspective from which to evaluate the Commission's current regulatory framework for the provision of information services. In this section, we describe some of the major provisions of the 1996 Act, and in later sections we examine how those provisions may affect our current rules.

1. Opening the Local Exchange Market

18. Various provisions of the 1996 Act are intended to open local exchange markets to competition. Section 251(c) of the Act requires, among other things, incumbent LECs, including the BOCs and GTE, to provide to requesting telecommunications carriers interconnection and access to unbundled network elements at rates, terms, and conditions that are just, reasonable, and nondiscriminatory, and to offer telecommunications services for resale.[53] Section 253(a) bars state and local governments from imposing certain legal requirements that prohibit or have the effect of prohibiting the ability of any entity to provide any telecommunications service, and section 253(d) authorizes the Commission to preempt such legal requirements to the extent necessary to correct inconsistency with the Act.[54] As a result, telecommunications carriers may now enter the local exchange market, and compete with the incumbent LEC, through access to unbundled network elements, resale, or through construction of network facilities.

19. In implementing section 251 of the Act, the Commission prescribed certain minimum points of interconnection necessary to permit competing carriers to choose the most efficient points at which to interconnect with the incumbent LEC's network. The Commission also adopted a minimum list of unbundled network elements (UNEs) that incumbent LECs must make available to new entrants, upon request.[55] In Parts III and IV below, we discuss and seek comment on the potential impact of these unbundling requirements in more detail, both with respect to the issue in *California III* regarding the Commission's justification of ONA unbundling as a condition of lifting structural separation, as well as our overall reexamination of the Commission's current nonstructural safeguards framework.

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[53] *See* 47 U.S.C. § 251(c).

[54] 47 U.S.C. § 253(a), (d).

[55] We note that states have the authority to adopt additional interconnection points or unbundled network elements in accordance with section 251 of the Act. *Local Competition Order*, 11 FCC Rcd at 15567, ¶ 136.

2. BOC Provision of Information Services

20. The 1996 Act conditions the BOCs' entry into the market for many in-region interLATA services, among other things, on their compliance with the separate affiliate, accounting, and nondiscrimination requirements set forth in section 272.[56] In the *Non-Accounting Safeguards Order*, we noted that these safeguards are designed to prohibit anticompetitive discrimination and improper cost allocation while still permitting the BOCs to enter markets for certain interLATA telecommunications and information services, in the absence of full competition in the local exchange marketplace.[57] We also concluded in the *Non-Accounting Safeguards Order* that the Commission's *Computer II*, *Computer III*, and ONA requirements are consistent with section 272 of the Act, and continue to govern the BOCs' provision of intraLATA information services, since section 272 only addresses BOC provision of interLATA services.[58]

21. Sections 260, 274, and 275 of the Act set forth specific requirements governing the provision of telemessaging, electronic publishing, and alarm monitoring services, respectively, by the BOCs and, in certain cases, by incumbent LECs. Section 260 delineates the conditions under which incumbent LECs, including the BOCs, may offer telemessaging services. We affirmed our conclusion in the *Non-Accounting Safeguards Order* that, since telemessaging service is an "information service," BOCs that offer interLATA telemessaging services are subject to the separation requirements of section 272.[59] We further concluded that the *Computer III*/ONA requirements are consistent with the requirements of section 260(a)(2), and, therefore, BOCs may offer intraLATA telemessaging services on an integrated basis subject to both *Computer III*/ONA and the requirements in section 260.[60]

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[56] An "in-region interLATA service" is interLATA service that originates in any of a BOC's in-region states, which are the states in which the BOC or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on February 7, 1996. 47 U.S.C. §§ 153(21), 271(i)(1); *see also* 47 C.F.R. § 53.3.

[57] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21911, ¶ 9.

[58] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21969, ¶ 132.

[59] *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5361, 5455, ¶ 210 (1997) (*Telemessaging and Electronic Publishing Order*), citing *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21975-76, ¶ 145.

[60] *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5455, ¶ 221.

22. Section 274 permits the BOCs to provide electronic publishing services, whether interLATA or intraLATA,[61] only through a "separated affiliate" or an "electronic publishing joint venture" that meets certain separation, nondiscrimination, and joint marketing requirements in that section.[62] The Commission found that there was no inconsistency between the nondiscrimination requirements of *Computer III*/ONA and section 274(d).[63] We therefore found that the *Computer III*/ONA requirements continue to govern the BOCs' provision of intraLATA electronic publishing.[64] We also noted that the nondiscrimination requirements of section 274(d) apply to the BOCs' provision of both intraLATA and interLATA electronic publishing.[65]

23. Section 275 of the Act prohibits the BOCs from providing alarm monitoring services until February 8, 2001, although BOCs that were providing alarm monitoring services as of November 30, 1995 are grandfathered. Section 275 of the Act does not impose any separation requirements on the provision of alarm monitoring services.[66] We concluded in the *Alarm Monitoring Order* that the *Computer III*/ONA requirements are consistent with the requirements of section 275(b)(1), and therefore continue to govern the BOCs' provision of alarm monitoring service.[67] We discuss the potential impact of the Act's new requirements for BOC provision of certain information services on our cost-benefit analysis of structural versus nonstructural safeguards in more detail in Part IV.B below.

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[61] We concluded that section 274 applies to a BOC's provision of both intraLATA and interLATA electronic publishing services, since, in contrast to section 272, Congress did not distinguish between such services in section 274. *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5383, ¶ 50.

[62] *See* 47 U.S.C § 274. Electronic publishing services are excluded from section 272's separation and other requirements for BOC provision of interLATA information services. *See* 47 U.S.C. § 272(a)(2)(C).

[63] *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5446, ¶ 199.

[64] *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5446, ¶ 200.

[65] *Id.*

[66] Alarm monitoring services are excluded from section 272's separation and other requirements for BOC provision of interLATA information services. *See* 47 U.S.C. § 272(a)(2)(C).

[67] *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, Second Report and Order, 12 FCC Rcd 3824, 3848-49, ¶ 55 (1997), *recons. pending* (*Alarm Monitoring Order*); *see also Enforcement of Section 275(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Against Ameritech Corporation*, CCBPol 96-17, Memorandum Opinion and Order, 12 FCC Rcd 3855 (1997), *vacated and remanded sub nom. Alarm Industry Communications Committee v. Federal Communications Commission and United States of America*, No. 97-1218, 1997 WL 791658 (D.C. Cir. Dec. 30, 1997).

III. CALIFORNIA III REMAND

A. Background

24. As noted above, in *California III*,[68] the Ninth Circuit reviewed the *BOC Safeguards Order*,[69] in which the Commission reaffirmed its earlier determination to remove structural separation requirements imposed on a BOC's provision of enhanced services, based on a BOC's compliance with ONA requirements and other nonstructural safeguards. The court found that, in the *BOC Safeguards Order*, and in the orders implementing ONA, the Commission had "changed its requirements for, or definition of, ONA so that ONA no longer contemplates fundamental unbundling."[70] Because, in the Ninth Circuit's view, the Commission had not adequately explained why this perceived shift did not undermine its decision to rely on the ONA safeguards to grant full structural relief, the court remanded the proceeding to the Commission.[71]

25. In the *Computer III Phase I Order*, the Commission declined to adopt any specific network architecture proposals or specific unbundling requirements, but instead set forth general standards for ONA.[72] BOCs were required to file initial ONA plans presenting a set of "unbundled basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible."[73] The Commission stated that, by adopting general requirements rather than mandating a particular architecture for implementing ONA, it wished to encourage development of efficient interconnection

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[68] *California v. FCC*, 39 F.3d 919 (9th Cir. 1994).

[69] *BOC Safeguards Order*, 6 FCC Rcd 7571 (1991).

[70] *California III*, 39 F.3d at 923, 930. While the court did not provide a specific definition of the phrase "fundamental unbundling," the *California III* decision relied upon and reaffirmed the court's *California II* determination that:

> [I]n *Computer III*, the FCC adopted general standards for ONA which the BOCs needed to satisfy as a precondition for lifting structural separation and which, when met, would eliminate the need for CEI plans. . . . The plans actually submitted pursuant to *Computer III*, however, did not meet those standards. The FCC recognized in the orders that the technology it thought in *Computer III* would soon permit open access and serve as a prerequisite to structural separation [sic] was not available; yet it approved the plans. This was a change in policy.

California II, 4 F.3d at 1512.

[71] *California III*, 39 F.3d at 930.

[72] *Computer III Phase I Order*, 104 FCC 2d at 1064, ¶ 213.

[73] *Computer III Phase I Order*, 104 FCC 2d at 1065, ¶ 216.

arrangements.[74] The Commission also noted that inefficiencies might result from "unnecessarily unbundled or splintered services."[75]

26. The *Computer III Phase I Order* required the BOCs to meet a defined set of unbundling criteria in order for structural separation to be lifted.[76] In the *BOC ONA Order*, the Commission generally approved the "common ONA model" proposed by the BOCs.[77] The common ONA model was based on the existing architecture of the BOC local exchange networks, and consisted of unbundled services categorized as basic service arrangements (BSAs),[78] basic service elements (BSEs),[79] complementary network services (CNSs),[80] and ancillary network services (ANSs).[81]

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[74] *Computer III Phase I Order*, 104 FCC 2d at 1064, ¶ 213.

[75] *Id.* at 1065, ¶ 217.

[76] *Computer III Phase I Order* at 1064, 1067-68, ¶¶ 213, 220-21. As noted above, the unbundling standard for the BOCs required that: (1) the BOCs' enhanced services operation obtain unbundled network services pursuant to tariffed terms, conditions, and rates available to all ESPs; (2) BOCs provide an initial set of basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible; (3) ESPs participate in developing the initial set of network services; (4) BOCs select the set of network services based on the expected market demand for such elements, their utility as perceived by enhanced service competitors, and the technical and costing feasibility of such unbundling; and (5) BOCs comply with CEI requirements in providing basic network services to affiliated and unaffiliated ESPs.

[77] *BOC ONA Order*, 4 FCC Rcd at 13, 41-42, ¶¶ 8, 69. The "common ONA model" is further discussed *infra* at Part IV.D.1.

[78] BSAs are the fundamental tariffed switching and transport services that allow an ESP to communicate with its customers through the BOC network. Under the common ONA model, an ESP and its customers must obtain some form of BSA in order to obtain access to the network functionalities that an ESP needs to offer its specific services. Examples of BSAs include line-side and trunk-side circuit-switched service, line-side and trunk-side packet switched service, and various grades of local private line service. *BOC ONA Order*, 4 FCC Rcd at 36, ¶ 56. BSAs must be included in a BOC's interstate access tariff, as well as tariffed at the state level. *Id.* at 116, 143-4, ¶¶ 226, 276.

[79] BSEs are optional unbundled features (such as calling number identification) that an ESP may require or find useful in configuring an enhanced service. *BOC ONA Order*, 4 FCC Rcd at 36, ¶ 57. BSEs must be tariffed at the federal and state levels. *Id.* at 145, ¶ 279.

[80] CNSs are optional unbundled features (such as stutter dial tone) that end-users may obtain from carriers in order to obtain access to or receive an enhanced service. *BOC ONA Order*, 4 FCC Rcd at 36, ¶ 57. CNSs must be tariffed at the state level, but need not be tariffed at the federal level. *Id.* at 47, ¶ 83.

[81] ANSs are non-regulated services, such as billing and collection, that may prove useful to ESPs. *BOC ONA Order*, 4 FCC Rcd at 36, 57-58, ¶¶ 57, 106.

27. In the *BOC ONA* proceeding, certain commenters criticized the common ONA model.[82] The commenters argued that the BOCs had avoided the *Computer III Phase I Order* unbundling requirements by failing to "disaggregate communications facilities and services on an element-by-element basis."[83] They urged the Commission to adopt a more "fundamental" concept of unbundling in the ONA context, by requiring the BOCs to unbundle facilities such as loops, as well as switching functions, inter-office transmission, and signalling.[84] Specifically, they claimed that BSAs could be further unbundled; *e.g.*, trunks could be unbundled from the circuit-switched, trunk-side BSA, so that ESPs could connect their own trunks to BOC switches.[85]

28. In the *BOC ONA Order*, the Commission rejected arguments that ONA, as set forth in the *Computer III Phase I Order*, required unbundling more "fundamental" than that set forth in the "common ONA model" proposed by the BOCs.[86] The Commission indicated that the *Computer III Phase I Order* anticipated that the BOCs would unbundle network services, not facilities, and determined that the ONA services developed by the BOCs under the common ONA model were consistent with the examples of service unbundling set forth in the *Computer III Phase I Order*.[87] The Ninth Circuit, however, agreed with the view that the

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[82] *BOC ONA Order*, 4 FCC Rcd at 37-41, ¶¶ 59-68. In general, these arguments were set forth in a report by Hatfield Associates, Inc., sponsored by Telenet, CompuServe, Dun & Bradstreet, CBEMA, and IDCMA. *See id.* n.112.

[83] *BOC ONA Order*, 4 FCC Rcd at 37, ¶ 59.

[84] *BOC ONA Order*, 4 FCC Rcd at 37, ¶ 60. The commenters characterized the unbundling achieved under the common ONA model as "a set of merely software-defined switching features." *Id.* at 37, 39, ¶ 60, 63.

[85] *BOC ONA Order*, 4 FCC Rcd at 37, ¶ 59. Other commenters, such as the American Petroleum Institute (API) and the Association of Data Communications Users (ADCU) also characterized BSAs as highly packaged, end-to-end services in which switching, signalling, and transmission functions are not disaggregated. *Id.* at 38-39, ¶ 62. MCI asserted that access, switching, and transport functions are all physically segregable, and should not be bundled in the form of BSAs. *Id.* at 39, ¶ 63.

[86] *BOC ONA Order*, 4 FCC Rcd at 13, 41, ¶¶ 8, 69. Instead, the Commission found that the common ONA model, which achieves BSE unbundling through the mechanism of software changes in end-office switches, "recognize[d] the realities" of then-current network architecture, and thus was "more likely to bring new features to ESPs at a faster rate, with less investment, than would a radical reconfiguration to a more modularized architecture." *BOC ONA Order* 4 FCC Rcd at 42, ¶ 70. The Commission, specifically rejecting any argument that BSAs should be further unbundled, found that requiring such further unbundling could cause technical and operational difficulties. *Id.* at 42, ¶ 71.

[87] *BOC ONA Order*, 4 FCC Rcd at 41, ¶ 69, citing *Computer III Phase I Order*, 104 FCC 2d at 1019-20, 1040, ¶¶ 113, 158, n.215. While rejecting the arguments of the parties that advocated further, or more "fundamental," unbundling, the Commission recognized that such unbundling, in the long run, might have pro-competitive effects as technology and regulatory policies evolve, and requested that the Information Industry Liaison Committee (IILC) investigate the technical and operational problems associated with such unbundling, in

Commission's approval of the BOC ONA plans, and subsequent lifting of structural separation, was a retreat from a "requirement" of "fundamental unbundling."[88]

B. Subsequent Events May Have Alleviated the Ninth Circuit's *California III* Concerns

29. In this section, we seek comment on whether the enactment and implementation of the 1996 Act, as well as other developments, should alleviate the Ninth Circuit's underlying concern about the level of unbundling mandated by ONA. Section 251 of the Act requires incumbent LECs, including the BOCs and GTE, to provide to requesting telecommunications carriers interconnection and access to unbundled network elements[89] at rates, terms, and conditions that are just, reasonable, and nondiscriminatory, and to offer telecommunications services for resale.[90] Section 251 also requires incumbent LECs to provide for physical collocation at the LEC's premises of equipment necessary for interconnection or access to unbundled network elements, under certain conditions.[91]

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order to lay the groundwork for future policymaking. *BOC ONA Order*, 4 FCC Rcd at 43, ¶ 72. The IILC was established in 1987 by the Exchange Carriers Standards Association (ECSA) to serve as an inter-industry forum for discussion and voluntary resolution of industry-wide concerns about the provision of ONA services and related matters. *BOC ONA Order*, 4 FCC Rcd at 31, ¶ 49. In 1994, the ECSA changed its name to the Alliance for Telecommunications Industry Solutions (ATIS). Effective January 1, 1997, the IILC was sunset as an ATIS-sponsored committee. Under a reorganizational plan approved by the ATIS board, all open issues and work programs underway at that time were transferred from the IILC to the Network Interconnection/ Interoperability Forum (NIIF). *See also infra* ¶¶ 82-84 for further discussion of NIIF functions.

[88] *See California III*, 39 F.3d at 923, 930.

[89] The statute defines "network element" as:

> a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information ... sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 153(29).

[90] *See* 47 U.S.C. §§ 251(c)(2)-(4). The Commission implemented the local competition provisions of sections 251 and 252 in the *Local Competition Order, supra* note 14. Certain portions of the Commission's rules, most notably the pricing rules and certain unbundling rules, were vacated by the United States Court of Appeals for the Eighth Circuit in the *Iowa Utilities Board* decision. *See Iowa Utilities Board*, 120 F.3d at 792-800, 807-818.

[91] 47 U.S.C. § 251(c)(6). The Eighth Circuit upheld the Commission's rules implementing the collocation requirement. *See Iowa Utilities Board*, 120 F.3d at 817.

30. In its regulations implementing these statutory provisions, the Commission identified a minimum list of network elements that incumbent LECs are required to unbundle, including local loops, network interface devices (NIDs), local and tandem switching capabilities, interoffice transmission facilities (often referred to as trunks), signalling networks and call-related databases, operations support systems (OSS) facilities, and operator services and directory assistance.[92] Additional unbundling requirements may be specified during voluntary negotiations between carriers, by state commissions during arbitration proceedings, or by the Commission as long as such requirements are consistent with the 1996 Act and the Commission's regulations.[93] We note that the 1996 Act creates particular incentives for the BOCs to unbundle and make available the elements of their local exchange networks. For example, section 271 provides that a BOC may gain entry into the interLATA market in a particular state by demonstrating, *inter alia*, that it has entered into access and interconnection agreements with competing telephone exchange service providers that satisfy the "competitive checklist" set forth in section 271(c)(2)(B).[94]

31. In our view, the unbundling requirements imposed by section 251 and our implementing regulations (hereinafter referred to as "section 251 unbundling") are essentially equivalent to the "fundamental unbundling" requirements proposed by certain commenters, and rejected by the Commission as premature, in the *BOC ONA Order*. These commenters asked the Commission to require the BOCs to unbundle network elements such as loops, switching functions, inter-office transmission, and signalling.[95] As noted above, section 251(c)(3) and the Commission's implementing regulations require those elements, and others, to be unbundled by the BOCs, and by other incumbent LECs that are subject to the requirements of section 251(c). In addition, the type and level of unbundling under section 251 is different and more extensive than that required under ONA.[96] This may be because

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[92] *Local Competition Order*, 11 FCC Rcd at 15683-15775, ¶¶ 366-541; *see also* 47 C.F.R. § 51.319. The Eighth Circuit upheld the Commission's determination that OSS, operator services and directory services, and vertical switching features (such as caller ID, call forwarding, and call waiting) qualify as network elements that are subject to the unbundling requirements of the Act. *Iowa Utilities Board*, 120 F.3d at 807-810.

[93] *Local Competition Order*, 11 FCC Rcd at 15625-26, 15631-32, ¶¶ 244, 246, 259. The FCC and the state commissions also have authority to require "more granular" unbundling of the specific network elements identified by the *Local Competition Order*. *Id.*, 11 FCC Rcd at 15631-32, ¶ 259.

[94] *See* 47 U.S.C. § 271(c). The "competitive checklist" itself contains specific unbundling requirements, including nondiscriminatory access to network elements (47 U.S.C. § 271(c)(2)(B)(ii)), unbundled local loop transmission (47 U.S.C. § 271(c)(2)(B)(iv)), unbundled local transport (47 U.S.C. § 271(c)(2)(B)(v)), unbundled local switching (47 U.S.C. § 271(c)(2)(B)(vi)), as well as nondiscriminatory access to databases and associated signaling necessary for call routing and completion (47 U.S.C. § 271(c)(2)(B)(x)). *But see* discussion of *SBC v. FCC, supra* note 18.

[95] *BOC ONA Order*, 4 FCC Rcd at 37, ¶ 60.

[96] *See infra* ¶ 93.

one of Congress's primary goals in enacting section 251 -- to bring competition to the largely monopolistic local exchange market -- is more far-reaching than the Commission's goal for ONA, which has been to preserve competition and promote network efficiency in the developing, but highly competitive, information services market.[97]

32. We recognize that, according to the terms of section 251, only "requesting telecommunications carriers" are directly accorded rights to interconnect and to obtain access to unbundled network elements.[98] In that regard, the section 251 unbundling requirements do not provide access and interconnection rights to the identical class of entities as does the ONA regime, since these rights do not extend to entities that provide solely information services ("pure ISPs"). We also recognize that the development of competition in the local exchange market has not occurred as rapidly as some expected since the enactment of the 1996 Act.[99]

33. We believe, however, that section 251 is intended to bring about competition in the local exchange market that, ultimately, will result in increased variety in service offerings and lower service prices, to the benefit of all end-users, including ISPs. Moreover, because local telecommunications services are important inputs to the information services ISPs provide, ISPs are uniquely positioned to benefit from an increasingly competitive local exchange market. There is evidence, for example, that carriers that have direct rights under section 251 will compete with the incumbent LECs to provide pure ISPs with the basic network services that ISPs need to create their own information service offerings, either by obtaining unbundled network elements for the provision of telecommunications services[100] or

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[97] *See, e.g., Computer II Final Decision,* 77 FCC 2d at 433, ¶ 128; *Computer III Phase I Order,* 104 FCC 2d at 1010, ¶ 95.

[98] *See* 47 U.S.C. § 251(c)(2), (c)(3). The Commission determined that entities that provide both telecommunications services and information services are classified as telecommunications carriers for the purposes of section 251, and are subject to the general interconnection obligations of section 251(a), to the extent that they are acting as telecommunications carriers. *Local Competition Order,* 11 FCC Rcd at 15990, ¶ 995. The Commission further concluded that telecommunications carriers that have obtained interconnection or access to unbundled network elements under section 251 in order to provide telecommunications services, may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well. *Id. See infra* ¶¶ 92-96 for a more complete discussion of section 251 unbundling vis-a-vis ONA. *See also* ¶ 8 for a discussion of the Universal Service Report.

[99] *Common Carrier Bureau Seeks Recommendations on Commission Actions Critical to the Promotion of Efficient Local Exchange Competition,* Public Notice, CCBPol 97-9, DA 97-1519 (rel. Jul. 18, 1997).

[100] The *Local Competition Order* states that incumbent LECs could not restrict the services that competitors could provide using unbundled network elements. *Local Competition Order,* 11 FCC Rcd at 15634, 15646, ¶¶ 264, 292.

through the resale of such services.[101] As a result, incumbent LECs have an incentive to provide an increased variety of telecommunications services to pure ISPs at lower prices in response to the market presence of such competitors. Pure ISPs also could enter into partnering or teaming arrangements with carriers that have direct rights under section 251.[102] In addition, ISPs can obtain certification as telecommunications service providers in order to receive direct benefits under section 251.[103] We also note that many ISPs that currently provide both telecommunications services and information services will have the benefit of both section 251 unbundling as well as ONA.[104]

34. For all these reasons, the fact that section 251's access and interconnection rights apply by their terms only to a "requesting telecommunications carrier" does not, in our view, change our conviction that the 1996 Act, as well as other factors, should alleviate the court's underlying concern in *California III* that the level of unbundling required under ONA does not provide sufficient protection against access discrimination. We seek comment on this analysis. In light of several recent court decisions bearing on these issues, we also ask commenters to address how the opinions of the Eighth Circuit Court of Appeals, including the decision regarding the recombination of unbundled network elements, as well as the decision of the United States District Court for the Northern District of Texas concerning the constitutionality of sections 271 through 275 of the Act, affect our analysis.[105]

35. In addition to the changes engendered by the 1996 Act, there have been other regulatory and market-based developments that, we believe, also should alleviate the court's underlying concern about whether the level of unbundling mandated by ONA provides sufficient protection against access discrimination. For example, the Commission's *Expanded Interconnection*[106] proceeding requires Class A LECs,[107] including the BOCs and GTE, to

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[101] *See, e.g., Third CLEC To Fan Flames of ISDN Competition*, ISDN News, Jan. 28, 1997 (discussing Intermedia Communications' plans to resell parts of the Bell networks to Internet service providers).

[102] *See, e.g., Internet Service Provider Outlines Regional ADSL Rollout*, Communications Today, June 17, 1997 (discussing plans of ioNet, an ISP, to partner with competitive local service providers to offer asymmetric digital subscriber line (ADSL) services).

[103] *See, e.g., Networking Business Concentric Plans IPO*, Communications Week, July 21, 1997 (discussing plans of Concentric Network Corp. to register as a competitive local exchange carrier in several states, which is described in the article as "a growing trend with ISPs").

[104] *See supra* note 98.

[105] *See supra* notes 14, 18.

[106] *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Special Access Interconnection Order*), *recon.*, 8 FCC Rcd 127 (1992), *further recon.*, 8 FCC Rcd 7341 (1993), *vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (subsequent citations omitted).

allow all interested parties to provide competitive interstate special access, transport, and tandem switched transport by interconnecting their transmission facilities with the LECs' networks.[108] Competing ISPs that utilize transmission facilities thus may provide certain transport functions as part of their enhanced services independent of the *Computer III* framework. These additional interconnection requirements, together with section 251 unbundling and the Commission's current ONA requirements, further help to protect ISPs against access discrimination by the BOCs. We seek comment on this analysis.

36. In addition, the level of competition within the information services market, which the Commission termed "truly competitive" as early as 1980,[109] has continued to increase markedly as new competitive ISPs have entered the market. The phenomenal growth of the Internet over the past several years illustrates how robustly competitive one sector of the information services market has become.[110] Recent surveys suggest that there are some 3,000 Internet access providers in the United States;[111] these providers range from small start-up operations, to large providers such as IBM and AT&T, to consumer online services such as America Online. We believe that other sectors of the information services market have also continued to grow, as we observed in the *Computer III Further Remand Notice*.[112] The presence of well-established participants in the information services market, such as EDS, MCI, AT&T, Viacom, Times-Mirror, General Electric, and IBM, may make it more difficult for BOCs to engage in access discrimination.[113] For example, the *California I* court indicated that "the emergence of powerful competitors such as IBM, which have the resources and expertise to monitor the quality of access to the network, reduces the BOCs' ability to

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[107] Class A LECs are companies having annual revenues from regulated telecommunications operations that equal or exceed the indexed revenue threshold (which is currently approximately $107 million). *See* 47 C.F.R. § 32.11(a)(1).

[108] *See* 47 C.F.R. §§ 64.1401, 64.1402. The *Local Competition Order* concluded that section 251 of the Act does not supersede the Commission's *Expanded Interconnection* rules, because the two sets of requirements are not coextensive. *See Local Competition Order*, 11 FCC Rcd at 15808, ¶ 611.

[109] *See Computer II Final Decision*, 77 FCC 2d at 433, ¶ 128. *See also Computer III Phase I Order*, 104 FCC 2d at 1010, ¶ 95 (concluding that the enhanced services market is "extremely competitive").

[110] As of January 1997, there were over 16 million host computers on the Internet, more than ten times as many as there were in January 1992. *See* Kevin Werbach, FCC Office of Plans and Policy, Working Paper 29, *Digital Tornado: The Internet and Telecommunications Policy*, 21-22 (March 1997) (*Digital Tornado*), citing *Network Wizards Internet Domain Survey* (Jan. 1997). One recent study estimated the number of U.S. subscribers to Internet services at 47 million. *See id.*, citing *Internet IT Informer* (Feb. 19, 1997).

[111] *See Digital Tornado* at 22, citing *Boardwatch Directory of Internet Service Providers* (Fall 1996).

[112] *Computer III Further Remand Notice*, 10 FCC Rcd at 8382, ¶ 32.

[113] *See Computer III Further Remand Notice*, 10 FCC Rcd at 8382, ¶ 33 & n.81.

discriminate in providing access to their competitors."[114] We seek comment on whether the sustained growth of competition within the information services market, including the continued participation of large information service competitors, serves to diminish further the threat of access discrimination and, consequently, the court's concern about whether the level of unbundling mandated by ONA is sufficient.[115]

IV. EFFECT OF THE 1996 ACT

37. As detailed in the background section, the Commission issued the *Computer III Phase I Order* more than ten years ago, shortly after divestiture, and before the BOCs had obtained authorization from the MFJ court to begin to provide information services.[116] Similarly, the implementation of ONA primarily took place between 1988 and 1992. Our objective is now, as it was then, to promote efficiency and increased service offerings while controlling anticompetitive behavior by the BOCs. We therefore reevaluate below the continuing need for these safeguards, in light of the 1996 Act and the significant technological and market changes that have taken place since the *Computer III* nonstructural safeguards were first proposed. This reevaluation is also part of the Commission's 1998 biennial review of regulations as required by the 1996 Act.[117]

A. Basic/Enhanced Distinction

38. In the *Computer II* proceeding, the Commission adopted a regulatory scheme that distinguished between the common carrier offering of basic transmission services and the offering of enhanced services.[118] The Commission defined a "basic transmission service" as the common carrier offering of "pure transmission capability" for the movement of information "over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."[119] The Commission further stated that a basic transmission service should be limited to the offering of transmission capacity between

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[114] *California I*, 905 F.2d at 1233.

[115] *See also infra* ¶¶ 90-91 where we seek comment on whether and how the development of new information services, including Internet services, which rely on emerging packet-switched networks, should affect the Commission's *Computer III* and ONA rules.

[116] *See supra* note 16.

[117] *See supra* ¶ 6; 47 U.S.C. § 161.

[118] *Computer II Final Decision*, 77 FCC 2d at 387, ¶ 5.

[119] *See Computer II Final Decision*, 77 FCC 2d at 419-20, ¶¶ 93, 96.